c) Other Proposed Alternative Regulations for Wireline Broadband Internet Access Services

96. Some commenters request that we impose certain content-related requirements on wireline broadband Internet access service providers that would prohibit them from blocking or otherwise denying access to any lawful Internet content, applications, or services a consumer wishes to access.[283] While we agree that actively interfering with consumer access to any lawful Internet information, products, or services would be inconsistent with the statutory goals of encouraging broadband deployment and preserving and promoting the open and interconnected nature of the public Internet,[284] we do not find sufficient evidence in the record before us that such interference by facilities-based wireline broadband Internet access service providers or others is currently occurring. Nonetheless, we articulate principles recognizing the importance of consumer choice and competition in regard to accessing and using the Internet: the *Internet Policy Statement* that we adopt today adopts such principles.[285] We intend to incorporate these principles into our ongoing policymaking activities.[286] Should we see evidence that providers of telecommunications for Internet access or IP-enabled services are violating these principles, we will not hesitate to take action to address that conduct.[287]

97. Finally, as noted above, some commenters, in acknowledging that the current *Computer Inquiry* regime is outdated, propose more streamlined regulatory requirements for wireline broadband Internet access service.[288] They seek to retain the core Title II principle underlying the *Computer Inquiry* obligations (*i.e.*, the requirement to separate out and offer any broadband Internet access transmission capabilities and services on a nondiscriminatory basis to *all* ISPs).[289] As the record demonstrates,

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[283] *See, e.g.*, Letter from Gerard J. Waldron, Coalition of Broadband Users and Innovators, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, at 1-2 (filed Aug. 27, 2003); Letter from Amy L. Levine, Counsel to Amazon.com, Covington & Burling, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, at 1-2 (filed May 21, 2003).

[284] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Policy Statement, FCC 05-151 (rel. Sept. 23, 2005) (*Internet Policy Statement*).

[285] *Id.* at para. 5.

[286] *Id.* at para. 6.

[287] Federal courts have long recognized the Commission's authority to promulgate regulations to effectuate the goals and accompanying provisions of the Act in the absence of explicit regulatory authority, if the regulations are reasonably ancillary to the effective performance of the Commission's various responsibilities. *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (*Southwestern Cable*); *see also FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (*Midwest Video II*); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest Video I*); *Promotion of Competitive Networks in Local Telecommunications Markets, Wireless Commun. Ass'n Int'l, Inc., Petition to Amend Section 1.4000 of the Commission's Rules*, WT Docket No. 99-217, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983, 23028-29, para. 101 & n.261 (2000) (*Competitive Networks*). In this regard, we note that the Enforcement Bureau recently entered into a consent decree to resolve an investigation with respect to the blocking of ports used for VoIP. *See Madison River LLC and Affiliated Companies*, File No. EB-05-IH-0110, Order, 20 FCC Rcd 4295 (Enf. Bur. 2005) (adopting a consent decree terminating an investigation into Madison River's compliance with section 201(b) regarding the unlawful blocking of ports used for VoIP applications).

[288] *See supra* para. 42.

[289] *Id.* The *Earthlink et al. Streamlining Proposal* would eliminate CEI's nine parameters and procedural requirements and ONA's unbundling obligations, reporting requirements, and BSE and BSA tariffing requirements. The underlying nondiscriminatory access obligations would be retained such that BOCs would be obligated to (continued . . .)

however, the inability to customize broadband service offerings inherent in the nondiscriminatory access requirement impedes deployment of innovative wireline broadband services taking into account technological advances and consumer demand.[290] Thus, continuing to impose such requirements would only perpetuate wireline broadband Internet access providers' inability to make better use of the latest integrated broadband equipment and would deprive consumers of more efficient and innovative enhanced services.[291] Similarly, a continued obligation to provide any new broadband transmission capability to all ISPs indiscriminately, and provide advance notice thereof, would reduce incentives to develop innovative wireline broadband capabilities and places wireline broadband at a substantial competitive disadvantage *vis-à-vis* cable modem and other broadband Internet access service providers.[292] Thus, we reject these proposals.

2. Current Title II Unbundled Wireline Broadband Internet Access Transmission Services Must Remain Available During a One-Year Transition Period

98. Although we determine above that immediate relief for wireline broadband Internet access transmission providers is warranted, we are nonetheless sensitive to the fact that the Commission's previous regulatory regime for these services has created reasonable reliance and expectation by unaffiliated ISPs on the availability of currently tariffed, broadband Internet access transmission offerings.[293] In addition, we are concerned that a flash-cut transition may unnecessarily disrupt customers' service due to a provider's inability to adapt its business practices so quickly. We therefore adopt a one-year transition period, which begins on the effective date of this Order, in order to give both ISPs and facilities-based wireline broadband Internet access transmission providers sufficient time to adjust to our new framework.[294] During the transition, facilities-based wireline broadband Internet access

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provide all of their broadband transmission services and capabilities to all ISPs on just, reasonable and nondiscriminatory rates, terms and conditions, including any offerings made pursuant to individual contracts with ISPs, as well as other access-related obligations such as access to electronic OSS, databases and other systems. In addition, BOCs would be required to develop new broadband transmission capabilities upon reasonable request by an ISP within 90 days. This proposal would, however, permit streamlined tariff or web posting requirements for transmission access services, but would still require advance notification of new or changed aspects of their transmission capabilities. *Earthlink et al. Streamlining Proposal, passim.*

[290] *See, e.g.*, Verizon June 26, 2003 *Ex Parte* Letter at 6-7 (noting that these proposed streamlined changes "do nothing to deal with the fundamental problems . . . that Verizon is unable to provide customers specially designed arrangements, specially designed terms and conditions or experimental offerings").

[291] *See id.* at 7; *see also supra* paras. 65-70 (discussing impact of unbundling obligation on ability to implement integrated equipment into offerings).

[292] *See, e.g.*, Verizon June 26, 2003 *Ex Parte* Letter at 6-7; *see also supra* para. 71 (discussing impact of nondiscrimination requirement on ability to respond to individualized requests.)

[293] *See, e.g.*, Big Planet Comments at 15; Covad Reply at 20-21; EarthLink Reply at 17-20, 22; *see also, e.g.*, *CompTel v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (stating that although temporary agency rules are subject to judicial review notwithstanding their transitory nature, substantial deference by courts is accorded to an agency when the issue concerns interim relief); *CompTel v. FCC*, 87 F.3d 522, 531 (D.C. Cir. 1996); *MCI v. FCC*, 750 F.2d 135, 140 (D.C. Cir. 1984). We note, however, that some ISPs have already engaged in contractual arrangements with facilities-based wireline broadband providers that enable them to obtain not only broadband transmission but also other enhanced services associated therewith. *See supra* para. 74.

[294] *See, e.g.*, SBC and USIIA May 3, 2002 *Ex Parte* Letter, Attach. at 2 (SBC and USIIA memorandum of understanding providing that SBC is willing to grandfather existing agreements with ISPs for their remaining term or one year, at the choice of the ISP); *see also* HTBC Reply at 7 (proposing a two-year period of non-common (continued . . .)

transmission providers must continue to honor existing transmission arrangements with their current ISP or other customers, but they are not required to offer such arrangements to new customers or to existing customers at new locations. If these arrangements are provided pursuant to tariffs currently on file with the Commission, wireline broadband Internet access transmission providers may retain these tariffs during the one-year period, or, alternatively, they may cancel the tariffs pursuant to normal tariff cancellation procedures provided they honor existing wireline broadband Internet access transmission arrangements in another manner. To the extent facilities-based wireline broadband Internet access transmission providers have entered into any other common carrier transmission arrangements with ISP customers that are not subject to tariffing,[295] these arrangements must also be continued during the one-year transition unless, of course, they would otherwise expire during the transition period pursuant to their pre-existing terms. Upon the effective date of this Order, facilities-based wireline broadband Internet access providers, including the BOCs and their affiliates, are no longer required to continue taking the existing common carrier transmission arrangements that they provide to ISPs as an input to their self-provided wireline broadband Internet access service. To the extent facilities-based carriers offer new wireline broadband Internet access transmission arrangements after the effective date of this Order or provide such service to new customers, these arrangements may be made available on a common carrier basis or a non-common carrier basis as set forth above.[296]

99. This one-year period will allow ISPs to continue operating under their current arrangements while they negotiate non-common carrier agreements with providers of wireline broadband Internet access transmission. Based on the assurances made by facilities-based wireline broadband Internet access providers and their stated desire to ensure that their platform is competitive with other broadband platforms, we strongly encourage the parties to work together to develop individual contracts that are mutually beneficial to each party.[297] In the meantime, the ability to continue operating under existing

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carriage coupled with, *inter alia*, the requirement that incumbent LECs honor their existing transmission arrangements with unaffiliated ISPs).

[295] *See, e.g., SBC Advanced Services Forbearance Order*, 17 FCC Rcd at 27008-16, paras. 13-28 (allowing SBC to provide advanced services on a detariffed basis to the extent SBC operates in accordance with a specified separate affiliate structure and other safeguards and commitments). SBC may already offer the transmission component of wireline broadband Internet access service on a detariffed basis. Any common carrier broadband Internet access transmission arrangements that an SBC affiliate has with an existing customer pursuant to the *SBC Advanced Services Forbearance Order* also are subject to this one-year transition.

[296] As defined in section 61.3(x) of our rules, a "new service offering" is one that "provides for a class or sub-class of service not previously offered by the carrier involved and that enlarges the range of service options available to ratepayers." 47 C.F.R. § 61.3(x). Consistent with this rule, we determine that an existing offering, for purposes of the transition, is one that was available, by tariff or by other similar means, to unaffiliated ISPs and other customers as of the date this Order is released. We note that we expect our actions in this Order to increase wireline providers' incentive and ability to deploy new broadband Internet access services. *See infra* Part V.B.2.c.

[297] *See supra* paras. 74-75; Letter from L. Barbee Ponder IV, Senior Regulatory Counsel-D.C., BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 02-33, at 3 (filed Apr. 20, 2004); SBC July 31, 2003 *Ex Parte* Letter at 7 ("The reason SBC has made an express commitment to continue offering independent ISPs commercial access arrangements in a deregulated environment is that SBC benefits from having independent ISPs as additional sales channels for its broadband services."); Verizon June 26, 2003 *Ex Parte* Letter at 3 ("Verizon recognizes the substantial value of providing wholesale broadband offerings to ISPs and intends to provide unaffiliated ISPs private carriage access to Verizon's network."); SBC and USIIA May 3, 2002 *Ex Parte* Letter at 1 & Attach. at 2 (SBC and USIIA memorandum of understanding dated May 2, 2003); *see also* Qwest May 23, 2003 *Ex Parte* Letter at 1, Attach. at 2 (indicating that consumers prefer having a choice of ISPs).

arrangements for an additional one-year period during new contract negotiations will avoid unnecessary customer disruption. Such a transition period is consistent with previous decisions in which the Commission modified the regulatory framework for certain services subject to a transition.[298] Indeed, several parties, including most BOCs, that urge elimination of the *Computer Inquiry* rules support a transition.[299] Here, as in these other proceedings, a transition period will allow sufficient time for all affected parties to adjust to the new framework without unnecessary disruption and without unduly extending the old framework.

3. Discontinuation of Service

100. Section 214(a) of the Act requires that, prior to discontinuing any interstate or foreign telecommunications service, a telecommunications carrier obtain from the Commission "a certification that neither the present nor future public convenience or necessity will be adversely affected thereby."[300] The reasons that persuade us not to require that the transmission component of wireline broadband Internet access service continue to be offered as a telecommunications service under Title II also persuade us that discontinuance of the provision of common carrier broadband Internet access transmission services to existing customers would not adversely affect the present or future public convenience or necessity. Instead, competition from other broadband Internet access service providers and the wireline providers' business incentives to attract ISP customers should ensure the continued availability of this transmission component, under reasonable rates, terms, and conditions.[301] Accordingly, we find that the circumstances here meet our test for determining whether a telecommunications service may be discontinued under section 214(a).[302]

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[298] *See, e.g., Computer II Final Decision*, 77 FCC 2d at 488, para. 266 (establishing a two-year transition period for carriers to restructure manner in which they were providing existing services affected by the new resale structure); *see also Triennial Review Order*, 18 FCC Rcd at 17137-41, paras. 264-69 (finding that a transitional mechanism is an effective means to implement a new regulatory regime and that section 201(b) gives the Commission broad authority to adopt a three-year transition for line sharing); *id.* at 17312-13, para. 525, 528-32 (adopting a transition plan to migrate the existing unbundled local circuit switching customer base to alternative service arrangements when unbundled local circuit switching was no longer available); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, 9186-87, paras. 77-78 (2001) (establishing a three-year interim intercarrier compensation regime for ISP-bound traffic to avoid a "flash cut" to a new compensation regime).

[299] *See, e.g.*, HTBC Reply at 7-8; *see also* Letter from Robert T. Blau, Vice President-Executive and Federal Regulatory Affairs, BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, at 1-2 (filed Sept. 29, 2003); Letter from W. Scott Randolph, Director-Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, Attach. at 1-2 (filed Sept. 29, 2003); Letter from James C. Smith, Senior Vice President, SBC, to Michael K. Powell, Chairman, FCC, CC Docket No. 02-33, at 1-2 (filed Sept. 29, 2003); Letter from Gary Lytle, Vice President-Federal Relations, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, at 1-3 (filed Sept. 30, 2003) (all supporting the HTBC proposed two-year transition plan).

[300] 47 U.S.C. § 214(a).

[301] *See supra* para. 91 (finding that mandatory tariffing of broadband Internet access telecommunications service offerings is not necessary to ensure that the rates, terms, and conditions for those offerings are just, reasonable, and not unjustly or unreasonably discriminatory).

[302] In evaluating discontinuance requests, the Commission considers a number of factors including: (1) the financial impact on the common carrier of continuing to provide the service; (2) the need for the service in general; (3) the need for the particular facilities in question; (4) the existence, availability, and adequacy of alternatives; and (5) increased charges for alternative services, although this factor may be outweighed by other considerations. *See* (continued . . .)

101. Therefore, pursuant to our rule for discontinuing domestic telecommunications services,[303] we grant facilities-based, wireline broadband Internet access transmission providers blanket certification to discontinue providing existing customers the common carrier broadband Internet access transmission services that are the subject of this Order,[304] subject to the following conditions.[305] First, to protect these customers against abrupt termination of service, we require that a carrier discontinuing common carrier broadband Internet access transmission service shall provide affected customers with advance notice of the discontinuance. Specifically, the carrier shall provide all affected customers with its name and address, the date of the planned discontinuance, the geographic areas where service will be discontinued, and a brief description of the service to be discontinued.[306] In addition, on or after the date it provides the advance notice to its customers and at least 30 days prior to the date on which service will be discontinued, the carrier must file with the Commission notice of its intent to discontinue service.[307] Carriers are not required to make any showing in this notice and do not need to obtain any additional permission from the Commission to cease service.[308] Upon notification of discontinuance, the Commission reserves the right to take actions where appropriate under the circumstances to protect the public interest.[309]

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Verizon Telephone Companies, Section 63.71 Application to Discontinue Expanded Interconnection Service Through Physical Collocation, WC Docket No. 02-237, Order, 18 FCC Rcd 22737, 22742, para. 8 (2003); *Application for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service*, File Nos. W-P-C-6670 and W-P-D-364, 8 FCC Rcd 2589, 2600, para. 54 (1993) (*Dark Fiber Order*), *remanded on other grounds, Southwestern Bell v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994). Here, requiring that wireline carriers continue to provide existing customers with the transmission component of wireline broadband Internet access service as a telecommunications service would harm the public interest by impeding the deployment of innovative broadband infrastructure and services responsive to consumer demands. *See supra* paras. 79-80.

[303] 47 C.F.R. § 63.71(c).

[304] *See supra* para. 9 (describing the scope of this Order).

[305] This discontinuance could occur at the end of the transition period or, provided that all existing customers of the grandfathered wireline broadband transmission service at issue have transitioned to some other type of service arrangement, sometime during the transition period. *See supra* para. 98.

[306] *See* 47 C.F.R. § 63.71(a)(1)-(a)(4). While we note that the affected customers typically will be ISPs that use the common carrier broadband Internet access transmission service as an input for the broadband Internet access services they offer end users, carriers may have other customers that also use these existing services. *See, e.g., supra* note 270 (describing Qwest's "DSL+" service).

[307] *See* 47 C.F.R. § 63.71(b). The carrier may provide this notice to the Commission at any time after the effective date of this Order. This notice shall be filed in CC Docket No. 02-33 and shall be captioned, "Notice of Discontinuance of Common Carrier Broadband Internet Access Transmission Service." The notice shall include, in addition to the information set forth in the notice provided affected customers, a brief description of the dates and methods of notice to those customers. *See* 47 C.F.R. § 63.71(b). The carrier shall submit copies of this notice to the state public utility commission and the Governor of each State in which service is to be discontinued as well as to the Special Assistant for Telecommunications at the Department of Defense. *See* 47 C.F.R. § 63.71(a).

[308] This Order provides carriers all necessary authority to cease providing to existing customers the common carrier broadband Internet access transmission services that are the subject of this Order.

[309] In the Notice of Proposed Rulemaking we adopt today, we seek comment on whether we should exercise our Title I authority to impose section 214-type requirements on providers of broadband Internet access service to protect end users from service discontinuance without notice. *See infra* Part VIII.E.

D. Classification of Wireline Broadband Internet Access Transmission Component

102. Above, we affirm that wireline broadband Internet access service is an information service, and decline to continue the reflexive application of the *Computer Inquiry* regime to facilities-based providers of such service. This is not, however, the end of our inquiry. The *Wireline Broadband NPRM* also sought comment on the legal classification of the transmission component underlying facilities-based wireline broadband Internet access service.[310] In contrast to the classification of wireline broadband Internet access service as an information service,[311] there is considerable disagreement in the record as to the appropriate classification of the transmission component of such Internet access service.[312] The legal classification of this transmission component has certain regulatory implications for its provider. Specifically, if the transmission component is a telecommunications service under the Act,[313] providers of that service are subject to common carrier regulation under Title II of the Act in their provision of that service.[314] Conversely, if the transmission component is not a telecommunications service under the Act, providers of that component are not subject to Title II requirements,[315] except to the extent the Commission imposes similar or identical obligations pursuant to its Title I ancillary jurisdiction.[316]

103. We address two circumstances under which the statutory classification of the transmission component arises: the provision of transmission as a wholesale input to ISPs (including affiliates) that provide wireline broadband Internet access service to end users, and the use of transmission as part and parcel of a facilities-based provider's offering of wireline broadband Internet access service using its own transmission facilities to end users. First, we address the wholesale input. Nothing in the Communications Act compels a facilities-based provider to offer the transmission component of wireline broadband Internet access service as a telecommunications service to anyone. Furthermore, consistent with the *NARUC* precedent,[317] the transmission component of wireline broadband Internet access service

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[310] *Wireline Broadband NPRM*, 17 FCC Rcd at 3029, para. 17, & 3033, para. 25.

[311] *See supra* Part IV.

[312] Several parties, including all of the BOCs, argue that wireline broadband Internet access service has a telecommunications component that does not fall under Title II. *See, e.g.*, Qwest Comments at 4; Verizon Comments at 9; NextLevel Reply at 7-10. Allegiance disputes this, arguing that "*self-provisioned* wireline broadband Internet access is a bundled offering of a telecommunications service *and* information service." Allegiance Comments at 12 (citing Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996) (*Joint Explanatory Statement*) (emphasis added)).

[313] 47 U.S.C. § 153(46).

[314] We note that the Commission has authority under section 10 of the Act to forbear from applying Title II requirements. *See* 47 U.S.C. § 160; *see also NCTA v. Brand X*, slip op. at 3.

[315] *See NCTA v. Brand X*, slip op. at 3-4.

[316] Indeed, it was precisely the Commission's historic exercise of its Title I ancillary jurisdiction that resulted in the imposition of the *Computer Inquiry* obligations that we eliminate today for wireline broadband Internet access service providers. *See supra* Part V.B; *see also NCTA v. Brand X*, slip op. at 24-25. We further note that the *Computer Inquiry* rules did not require a Title II offering with respect to the end user of the information service for which the transmission is a component; rather, those rules required the offering of a Title II transmission component offering to competing information services providers.

[317] Under the so-called *NARUC I* decision, and other compelling precedent, the Commission and courts perform a two-step analysis to determine whether a communications service offering is subject to Title II. First, the Commission inquires whether there is a legal compulsion to serve the public indifferently. *NARUC I*, 525 F.2d at 642 ("we must inquire, first, whether there will be any legal compulsion . . . to serve [the public] indifferently"). (continued . . .)

is a telecommunications service only if one of two conditions is met: the entity that provides the transmission voluntarily undertakes to provide it as a telecommunications service; or the Commission mandates, in the exercise of our ancillary jurisdiction under Title I, that it be offered as a telecommunications service.[318] As to the first condition, we explain above that carriers may choose to offer this type of transmission as a common carrier service if they wish. In that circumstance, it is of course a telecommunications service. Otherwise, however, is it not, as we would not expect an "indifferent holding out" but a collection of individualized arrangements.[319] As to the second condition, based on the record, we decline to continue our reflexive application of the *Computer Inquiry* requirement, which compelled the offering of a telecommunications service to ISPs.[320] Thus, we affirm that neither the statute nor relevant precedent mandates that broadband transmission be a telecommunications service when provided to an ISP, but the provider may choose to offer it as such.

104. Second, we address the use of the transmission component as part of a facilities-based provider's offering of wireline broadband Internet access service to end users using its own transmission facilities. We conclude, consistent with *Brand X*, that such a transmission component is mere "telecommunications" and not a "telecommunications service."[321] As stated above, the Act defines telecommunications service as "the *offering* of telecommunications for a fee directly *to the public*, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[322] Thus, whether a telecommunications service is being provided turns on what the entity is "offering . . . to the public," and customers' understanding of that service.[323] End users subscribing to wireline broadband Internet access service expect to receive (and pay for) a finished, functionally integrated service that provides access to the Internet. End users do not expect to receive (or pay for) two distinct services – both Internet access

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Second, if the Commission finds that neither the statute nor the public interest compel a common carriage offering of the service, the Commission then examines "whether there are reasons implicit in the nature of [the provider's] operations to expect an indifferent holding out to the eligible user public." *NARUC I*, 525 F.2d at 642; *see Vitelco v. FCC*, 198 F.3d at 924 (asking whether the service provider intends to "make capacity available to the public indifferently"). In the communications context, implicit in this prong is the notion that the carrier is providing a service whereby customers may "transmit intelligence of their own design and choosing." *See CCIA v. FCC*, 693 F.2d at 210 (citing *NARUC I*, 525 F.2d at 641 n.58 (quoting *Industrial Radiolocation Service*, 5 FCC 2d 197, 202 (1966))) (internal quotation marks omitted).

[318] *See Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (*Southwestern Bell*); *AT&T-SSI*, 13 FCC Rcd at 21588-89, paras. 8-9; *NORLIGHT Request for Declaratory Ruling*, 2 FCC Rcd 132, 133, para. 14 (1987); *NARUC II*, 533 F.2d at 608-09; *NARUC I*, 525 F.2d at 640. In 1998, the Commission found, and the court agreed, that the enactment of the 1996 Act did not disturb the *NARUC I* decision's common carriage test. *See Vitelco v. FCC*, 198 F.3d at 927 (holding that "the legislative history [of the 1996 Act] . . . can be reasonably construed as manifesting Congress' intention to maintain the public-private dichotomy of *NARUC I*").

[319] *NARUC I*, 525 F.2d at 642.

[320] *See supra* Part V.A.2

[321] *See NCTA v. Brand X*, slip op. at 14-31(affirming as a reasonable construction of the statute the Commission's conclusion that cable modem service does not include a telecommunications service).

[322] 47 U.S.C. § 153(46) (emphasis added).

[323] *See NCTA v. Brand X*, slip op. at 10 (discussing the word "offering" in the statutory definition of "telecommunications service").

service and a distinct *transmission* service, for example.[324] Thus, the transmission capability is part and parcel of, and integral to, the Internet access service capabilities.[325] Accordingly, we conclude that wireline broadband Internet access service does not include the provision of a telecommunications service to the end user irrespective of how the service provider may decide to offer the transmission component to other service providers.

105. In so concluding, we reject arguments that companies using their own facilities to provide wireline broadband Internet access service simultaneously provide a telecommunications service to their end user wireline broadband Internet access customers.[326] The record demonstrates that end users of wireline broadband Internet access service receive and pay for a single, functionally integrated service, not two distinct services.[327] This conclusion also is consistent with certain past Commission pronouncements that the categories of "information service" and "telecommunications service" are mutually exclusive.[328] Moreover, the fact that the Commission has, up to now, required facilities-based providers of wireline broadband Internet access service to separate out a telecommunications transmission service and make that service available *to competitors* on a common carrier basis under the *Computer Inquiry* regime has no bearing on the nature of the service wireline broadband Internet access service providers offer their *end user customers*.[329] We conclude now, based on the record before us, that wireline broadband Internet access service is, as discussed above, a functionally integrated, finished product, rather than both an information service and a telecommunications service.

106. Finally, some parties argue (without clearly distinguishing between the transmission component as a wholesale input and transmission used to provide the information service to the end user) that

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[324] *NCTA v. Brand X*, slip op. at 18 (stating that "[i]t is common usage to describe what a company 'offers' to a consumer as what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product").

[325] *NCTA v. Brand X*, slip op. at 18-19 (explaining the integrated nature of the transmission component in cable modem Internet access service); *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4823, paras. 39-40; SBC Comments at 17.

[326] *See, e.g.*, Allegiance Comments at 8-9 ("[T]hroughout the past 25 years, the Commission has consistently determined that facilities-based providers [of information service] provide two separate services – a telecommunications service and an information service."); *id.* at 10-11 (arguing that Commission has already imposed "two-service treatment for regulatory purposes" on incumbent LEC-provided broadband Internet access); McLeodUSA Comments at 9 ("The [1996 Act] definitions of the terms 'information service,' 'telecommunications service,' and 'telecommunications' were expressly intended to acknowledge the concept from the *Computer Inquiry* cases that *there is always a 'telecommunications service' underlying every 'information service.'*") (emphasis added); *id.* at 11-12 (since certain functions of wireline broadband Internet access service, such as e-mail, file transfer, and instant messaging, provide "raw transmission," that service is a telecommunications service, and therefore "the service offered to customers as 'broadband access' includes both information services and telecommunications services"); US LEC Comments at 2-3; ASCENT Reply at 3-4.

[327] *E.g.*, SBC Comments at 16-17; Qwest Reply at 4-8; Verizon Reply at 6-11.

[328] As explained above, although the Commission has not been entirely consistent on this point, we agree for the wireline broadband Internet access described in this Order with the past Commission pronouncements that the categories of "information service" and "telecommunications service" are mutually exclusive. *See supra* note 32.

[329] *See infra* Part V.A; *see also NCTA v. Brand X*, slip op. at 24-25 (observing that "[i]n the *Computer II* rules, the Commission subjected facilities-based providers to common carrier duties not because of the nature of the 'offering' made by those carriers, but rather because of the concern that local telephone companies would abuse the monopoly power they possessed by virtue of the 'bottleneck' local telephone facilities they owned").

Commission precedent mandates that we classify the transmission underlying wireline broadband Internet access as a telecommunications service.[330] We disagree. As an initial matter, as the Supreme Court held in relation to the transmission underlying cable modem service, "the Commission is free within the limits of reasoned interpretation to change course if it adequately justifies the change."[331] The Court acknowledged the Commission's ability to respond to changed circumstances and market conditions, factors which serve as the basis for the actions we take in this Order.[332] The previous orders upon which commenters rely assumed, correctly in each instance, that the offering of DSL transmission on a common carrier basis was a telecommunications service.[333] These decisions, however, did not address the important threshold public interest issue we address in this Order – whether this broadband transmission component must continue to be offered to competing providers of facilities-based wireline broadband Internet access service on a common carrier basis. And as we explain above, the current record does not support a finding or compulsion that the transmission component of wireline broadband Internet access service is a telecommunications service as to the end user.[334]

107. Now that we have concluded that a common carrier offering is no longer required, and have made the statutory classification findings, we address what impact these actions have on other regulatory obligations.[335]

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[330] *See, e.g.*, AOL Comments at 6-12; Covad Comments at 72-75; Time Warner Comments at 9-16; Vermont Commission Comments at 20-26; Letter from Ruth Milkman, Counsel to MCI, to Michelle Carey, Chief, Competition Policy Division, Wireline Competition Bureau, FCC, CC Docket Nos. 02-33 & 01-337, at 2 (filed June 23, 2003) (MCI June 23, 2003 *Ex Parte* Letter) (citing *Wireline Broadband NPRM*, 17 FCC Rcd at 3040, para. 42).

[331] *See NCTA v. Brand X*, slip op. at 14.

[332] *See id.*, slip op. at 15.

[333] For example, in its *AOL Bulk Services Order*, the Commission stated that although bulk DSL services sold to ISPs are not retail services subject to section 251(c)(4), "these services are telecommunications services. . . ." *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Second Report and Order, 14 FCC Rcd 19237, 19247, para. 21 (1999) (*AOL Bulk Services Order*). In that order, the Commission devoted its entire analysis to section 251(c)(4) and only in its "Conclusion" did it mention that incumbent LECs must continue to comply with their common carrier obligations. *Id.* Similarly, in its *GTE DSL Order*, the Commission found that GTE's asynchronous DSL (ADSL) service offering was interstate and appropriately tariffed with the Commission. *GTE Telephone Operating Cos. GTOC Tariff No. 1, GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, para. 1 (1998) (*GTE DSL Order*), *recon.*, 17 FCC Rcd 27409 (1999) (*GTE DSL Reconsideration Order*). Again, its analysis concerned another issue – the jurisdiction of GTE's ADSL transmission for purposes of determining whether GTE should file an interstate, as opposed to intrastate, tariff. *Id.* at 22478-79, para. 22 (noting that this transmission "does in fact constitute an interstate telecommunication"). Similarly, in the *CPE/Enhanced Services Bundling Order*, the Commission assumed without analysis that the provision of DSL was a telecommunications service. *CPE/Enhanced Services Bundling Order*, 16 FCC Rcd at 7445-46, para. 46.

[334] To the extent *NARUC I* is relevant to this inquiry, our analysis accords with this precedent. There is no legal compulsion to serve the public indifferently. Nor is there anything implicit in the nature of wireline broadband Internet access service that makes it reasonable to expect that its telecommunications component would be offered to the public indifferently. Consequently, *NARUC I* provides no support for claims that the transmission component of facilities-based wireline broadband Internet access service is, or must be found to be, a telecommunications service.

[335] We find moot Verizon's pending petition for forbearance with regard to broadband services provided via FTTP, as well as its simultaneously filed petition for declaratory ruling or interim waiver with regard to the same services. Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises, WC Docket No. 04-242 (filed June 28, 2004) (Verizon (continued . . .)

VI. EFFECT ON EXISTING OBLIGATIONS

108. The *Wireline Broadband NPRM* sought comment on what effect classifying wireline broadband Internet access service as an information service would have on other regulatory obligations. Title II obligations have never generally applied to information services, including Internet access services.[336] Instead, when the Commission has deemed it necessary to impose regulatory requirements on information services, it has done so pursuant to its Title I ancillary jurisdiction. Indeed, as noted above, the Commission imposed the *Computer Inquiry* obligations on facilities-based common carriers pursuant to its Title I ancillary jurisdiction.[337] Similarly, the Commission has exercised its ancillary jurisdiction under Title I to extend accessibility obligations that mirror those under section 255 to certain information services, *i.e.*, voicemail and interactive menu service.[338] The Commission's ancillary jurisdiction under Title I to impose regulatory obligations on broadband Internet access service providers was recently recognized by the Supreme Court.[339]

109. The Commission may exercise its ancillary jurisdiction when Title I of the Act gives the Commission subject matter jurisdiction over the service to be regulated[340] and the assertion of jurisdiction

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FTTP Forbearance Petition); Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises, WC Docket No. 04-242 (filed June 28, 2004) (Verizon FTTP Petition for Declaratory Ruling or Interim Waiver). In these two petitions, Verizon sought to ensure that it could "offer those of its broadband services that are provided via [FTTP] in the same manner that cable companies offer broadband services via cable modem." Verizon FTTP Forbearance Petition at 1. Verizon emphasized that the relief sought in its petitions would be temporary, necessary only "[u]ntil the Commission has determined an appropriate regulatory framework for broadband generally." *Id.*, Attach. at 12. Because this Order establishes a regulatory framework for wireline broadband Internet access service and eliminates disparities between the regulatory treatment of that broadband and cable modem service, Verizon's petitions are moot.

[336] *See Report to Congress*, 13 FCC Rcd at 11523-24, para. 44 (noting legislative history demonstrating a Congressional intent that information service providers not be deemed providers of telecommunications service); *Computer II Final Decision*, 77 FCC 2d at 428-35, paras. 114-132 (enhanced services are not subject to Title II obligations); *see also Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4823, paras. 39-40.

[337] *See supra* para. 24.

[338] *See infra* para. 121.

[339] *See NCTA v. Brand X*, slip op. at 25 (stating that after designating cable modem service an information service, "the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction").

[340] *See Southwestern Cable*, 392 U.S. at 177-78. *Southwestern Cable*, the lead case on the ancillary jurisdiction doctrine, upheld certain regulations applied to cable television systems at a time before the Commission had an express congressional grant of regulatory authority over that medium. *See id.* at 170-71. In *Midwest Video I*, the Supreme Court expanded upon its holding in *Southwestern Cable*. The plurality stated that "the critical question in this case is whether the Commission has reasonably determined that its origination rule will 'further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services . . . .'" *Midwest Video I*, 406 U.S. at 667-68 (quoting *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals*, Docket No. 18397, First Report and Order, 20 FCC 2d 201, 202 (1969) (*CATV First Report and Order*)). The Court later restricted the scope of *Midwest Video I* by finding that if the basis for jurisdiction over cable is that the authority is (continued . . .)

is "reasonably ancillary to the effective performance of [its] various responsibilities."[341] We recognize that both of the predicates for ancillary jurisdiction are likely satisfied for any consumer protection, network reliability, or national security obligation that we may subsequently decide to impose on wireline broadband Internet access service providers.[342]

110. First, we find that we have subject matter jurisdiction over providers of broadband Internet access services. These services are unquestionably "wire communication" as defined in section 3(52)[343] because they transmit signals by wire or cable, or they are "radio communication" as defined in section 3(33) if they transmit signals by radio.[344] The Act gives the Commission subject matter jurisdiction over "all interstate and foreign communications by wire or radio . . . and . . . all persons engaged within the United States in such communication" in section 2(a).[345] Second, with regard to consumer protection obligations, we find that regulations would be "reasonably ancillary" to the Commission's responsibility to implement sections 222 (customer privacy), 255 (disability access), and 258 (slamming and truth-in-billing), among other provisions, of the Act.[346] Similarly, network reliability, emergency preparedness, national security, and law enforcement requirements would each be reasonably ancillary to the Commission's obligation to make available "a rapid, *efficient*, Nation-wide, and world-wide wire and radio communication service . . . for the purpose of the *national defense* [and] for the purpose of *promoting safety of life and property* through the use of wire and radio communication."[347]

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ancillary to the regulation of broadcasting, the cable regulation cannot be antithetical to a basic regulatory parameter established for broadcast. *See Midwest Video II*, 440 U.S. at 700; *see also American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005) (holding that the Commission lacked authority to impose broadcast content redistribution rules on equipment manufacturers using ancillary jurisdiction because the equipment at issue was not subject to the Commission's subject matter jurisdiction over wire and radio communications).

[341] *Southwestern Cable*, 392 U.S. at 178; *see also VoIP E911 Order*, at paras. 26-35.

[342] To this end, we concurrently adopt a Notice of Proposed Rulemaking (Notice) to determine what specific duties are necessary for broadband Internet access service providers, regardless of the technology they employ, to ensure the Commission's ability to fulfill its statutory obligations in the important area of consumer protection. *See infra* Part VIII.

[343] Section 3(52) of the Act defines the term "wire communication" or "communication by wire" to mean "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. § 153(52). As the Commission recently found with respect to VoIP services, irrespective of whether such services are telecommunications services or information services, based on sections 1 and 2(a) of the Act, 47 U.S.C. §§ 151, 152(a), they are covered by the Commission's general jurisdictional grant. *See VoIP E911 Order* at paras. 26-35.

[344] 47 U.S.C. § 153(33) (defining "radio communication" as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission").

[345] 47 U.S.C. § 152(a).

[346] As we have explained, the Commission's truth-in-billing rules derive from section 258 as well as section 201(b). *See infra* paras. 152-53.

[347] 47 U.S.C. § 151 (emphasis added); *see also VoIP E911 Order* at para. 29.

111. In the attached *Notice of Proposed Rulemaking* (*Notice*), we specifically seek comment on what obligations we should impose pursuant to our Title I authority to further consumer protection in the broadband age. We emphasize that we will not hesitate to adopt any non-economic regulatory obligations that are necessary to ensure consumer protection and network security and reliability in this dynamically changing broadband era.

A. Federal Universal Service Contribution Obligations

112. In section 254 of the Act, Congress codified our Federal universal service programs to ensure affordable telecommunications services to all Americans, including consumers living in high-cost areas, low income consumers, eligible schools and libraries, and rural health care providers. In this section, we address the universal service contribution obligations of providers of wireline broadband Internet access service. Section 254(d) of the Act states that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute" to universal service.[348] In the *Universal Service Order*, the Commission interpreted the first sentence of section 254(d) as imposing a mandatory contribution requirement on all telecommunications carriers that provide interstate telecommunications services.[349] In the *Wireline Broadband NPRM*, the Commission recognized that, under its existing rules and policies, telecommunications carriers providing telecommunications services, including broadband transmission services, are subject to universal service contribution requirements.[350] Under current law, the Commission has permissive authority to require "[a]ny other provider of interstate telecommunications to contribute to universal service if required by the public interest."[351] The question of "whether and under what circumstances the public interest would require us to exercise our permissive authority over wireline broadband Internet access providers" is pending before the Commission in this docket.[352] In addition, the question of "whether other facilities-based providers of broadband Internet access services may, as a legal matter, or should as a policy matter, be required to contribute" is also pending before us.[353] We expect to address these issues in a comprehensive fashion either in this docket or in the *Universal Service Contribution Methodology* proceeding now pending in Docket No. 96-45.[354]

113. Congress required in section 254 of the Act that "[t]here should be specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service."[355] Accordingly, we conclude that facilities-based providers of wireline broadband Internet access services must continue to contribute to existing universal service support mechanisms based on the current level of reported revenue for the transmission component of their wireline broadband Internet access services for a 270-day period

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[348] 47 U.S.C. § 254(d).

[349] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9173, para. 777 (1997) (*Universal Service Order*) (subsequent history omitted); *see also* 47 C.F.R. § 54.706.

[350] *Wireline Broadband NPRM*, 17 FCC Rcd at 3051, para. 72; *see also CPE/Enhanced Services Bundling Order*, 16 FCC Rcd at 7446-47, para. 48.

[351] 47 U.S.C. § 254(d).

[352] *Wireline Broadband NPRM*, 17 FCC Rcd at 3052, para. 74.

[353] *Id.* at 3054, para. 79.

[354] *E.g.*, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24983-97, paras. 66-100 (2002) (*Universal Service Contribution Methodology NPRM*).

[355] 47 U.S.C. § 254(b)(5).

after the effective date of this Order or until we adopt new contribution rules in the *Universal Service Contribution Methodology* proceeding,[356] whichever occurs earlier. That is, wireline broadband Internet access providers must maintain their current universal service contribution levels attributable to the provision of wireline broadband Internet access service for this 270-day period.[357] We take this action, as a matter of policy, to preserve existing levels of universal service funding, and prevent a precipitous drop in fund levels while we consider reform of the system of universal service in the *Universal Service Contribution Methodology* proceeding.[358] We are committed to ensuring that there continue to be specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service. If we are unable to complete new contribution rules within the 270-day period of time, the Commission will take whatever action is necessary to preserve existing funding levels, including extending the 270-day period discussed above or expanding the contribution base. We have ample authority to take interim actions to preserve the *status quo*.[359]

B. Law Enforcement, National Security, and Emergency Preparedness

1. CALEA

114. The Communications Assistance for Law Enforcement Act (CALEA) requires telecommunications carriers to ensure that "equipment, facilities or services that provide a customer or subscriber with the ability to originate, terminate, or direct [communications]" are capable of providing authorized surveillance to law enforcement agencies.[360] In a separate order adopted today, we conclude that providers of facilities-based broadband Internet access service and interconnected VoIP service are subject to CALEA.[361] We therefore do not address CALEA issues in this Order.

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[356] *E.g.*, *Universal Service Contribution Methodology NPRM*, 17 FCC Rcd 24952, 24983-97, paras. 66-100.

[357] Of course, as we stated above, some providers of wireline broadband Internet access service may choose to offer a stand-alone broadband telecommunications service on a common carrier basis. To the extent that they do so, they must continue to contribute to universal service mechanisms on a permanent basis pursuant to section 254(d).

[358] *See Universal Service Contribution Methodology NPRM*, 17 FCC Rcd 24952, 24983-97, paras. 66-100.

[359] As the D.C. Circuit has held, "[a]voidance of market disruption pending broader reforms is, of course, a standard and accepted justification for a temporary rule." *Competitive Telecommunications Ass'n v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002) (citing *MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984) (*MCI v. FCC*) & *ACS of Anchorage v. FCC*, 290 F.3d 403, 410 (D.C. Cir. 2002)). Indeed, "[s]ubstantial deference must be accorded an agency when it acts to maintain the *status quo* so that the objectives of [related proceedings] will not be frustrated." *MCI v. FCC*, 750 F.2d at 141. Similarly, we require facilities-based wireline broadband Internet access services providers that are subject to the actions we take today to continue contributing to the Telecommunications Relay Services (TRS) Fund and the North American Numbering Plan Administration (NANPA) cost recovery mechanisms during the transition. *See supra* para. 68 & *infra* note 390.

[360] *See* 47 U.S.C. § 1002(a). As noted by the Department of Justice and Federal Bureau of Investigation, "CALEA is intended to preserve the government's *technical* capability to conduct electronic surveillance that is otherwise allowed under the law." DOJ/FBI Comments at 4 (emphasis in original).

[361] *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, First Report and Order and Further Notice of Proposed Rulemaking, FCC 05-153 (rel. Sept. 23, 2005) (determining that providers of facilities-based broadband Internet access service and interconnected VoIP service are subject to CALEA).

2. USA PATRIOT Act

115. We find that our actions in this Order will not affect the government's implementation or enforcement of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act).[362] This Act amended the federal criminal code to authorize the interception of *wire and electronic communications* for the production of evidence of terrorism offenses and computer fraud, and modified only one section of the Communications Act, section 631 of Title VI.[363] We conclude that the scope of activities covered under the definitions of wire communications and electronic communications is broad enough to encompass wireline broadband Internet access service regardless of the legal classification of this service, or its transmission component, under the Communications Act. Only one party submitted comments on the subject, agreeing that the legal classification of wireline broadband Internet access service as an information service will have no impact on the applicability of the USA PATRIOT Act.[364]

3. Emergency Preparedness and Response

116. We find that our classification of wireline broadband Internet access service as an information service, and the transmission input as telecommunications (except to the extent that the provider chooses to offer that transmission on a common carrier basis), will not affect the Commission's existing rules implementing the National Security Emergency Preparedness (NSEP) Telecommunications Service Priority (TSP) System.[365] But, we will nonetheless exercise our Title I authority, as necessary, to give full effect to the principles and purpose of the NSEP TSP System. The NSEP TSP System is set forth in appendix A to Part 64 of the rules and provides that the Commission has "authority over the assignment and approval of priorities for provisioning and restoration of common carrier-provided telecommunications services."[366] The facilities-based wireline broadband Internet access service providers that are the subject of our Order today are telecommunications carriers with respect to other services that they provide. Therefore, we find that these providers remain subject to the NSEP TSP.

117. The Secretary of Defense (Secretary), the only party to submit comments on this issue, expressed concern that the existing National Communications System programs will no longer apply to wireline broadband Internet access service if it is classified as an information service unless the Commission exercises its ancillary jurisdiction.[367] As the Secretary recognizes, NSEP communications are currently

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[362] P. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of 18 U.S.C., 47 U.S.C., 50 U.S.C.).

[363] *See* § 211 of the USA PATRIOT Act (amending 47 U.S.C. § 631(c)(2) to permit specified disclosures to government entities, except for records revealing cable subscriber selection of video programming, for a cable operator).

[364] *See* SBC Reply at 52 (citing 18 U.S.C. §§ 2510(12), 2703).

[365] The NSEP TSP System enables telecommunications users with responsibility for national security and emergency preparedness to receive priority in the deployment of new telecommunications services and the restoration of existing telecommunications services vital to coordinating and responding to natural and man-made disasters. *See Welcome to the TSP Website!*, available at http://tsp.ncs.gov/ (visited July 28, 2005).

[366] 47 C.F.R. Pt. 64, App. A, at § 1.b.

[367] Secretary of Defense Comments at 4-5 (citing *Southwestern Cable*, 392 U.S. at 178 (holding that the Commission has ancillary jurisdiction where it has subject matter jurisdiction under Title I of the Act and the subject of the regulation is "reasonably ancillary to the effective performance of the Commission's various responsibilities")). Among other functions, the National Communications System helps coordinate the planning for and provision of national security and emergency preparedness communications for the Federal government during (continued . . .)

provided by carriers subject to Title II.[368] Information service providers, therefore, have not been subject to these rules unless those providers are also offering services as telecommunications carriers.[369] Since the actions we take in this Order affect only wireline carriers that provide the transmission component of wireline broadband Internet access service, we have no reason to expect that those actions will adversely affect emergency preparedness efforts. These service providers, for the most part, provide their wireline broadband Internet access services over the same facilities used to provide other telecommunications services and thus these facilities remain subject to Part 64 to the same extent as they have before. Moreover, we do agree with the Secretary's conclusion that, should the need arise, we do have the authority to regulate NSEP under Title I. We will closely monitor the development of wireline broadband Internet access service and its effect on the NSEP TSP System and, if needed, will expeditiously take all appropriate actions to promote the viability of that system.[370]

118. Moreover, lest there be any uncertainty, we state that our decision to classify wireline broadband Internet access service as an information service, and the transmission input as telecommunications (except when offered on a common carrier basis), has no effect whatsoever on our recently adopted E911 rules for interconnected VoIP providers.[371] In that order, we required providers of interconnected VoIP[372] to offer E911 service to their subscribers. Although interconnected VoIP is necessarily provided via broadband, nothing in the *VoIP E911 Order* in any way turns on the statutory classification of that broadband connection. Thus, we reaffirm that, after today's Order, interconnected VoIP providers must comply with the *VoIP E911 Order* regardless of how or by whom the underlying broadband connection is provided.

4. Network Reliability and Interoperability

119. We reject arguments that classifying wireline broadband Internet access service as an "information service" and its transmission component as "telecommunications" (except to the extent that the provider chooses to offer that transmission on a common carrier basis) requires that we obtain additional authorization from the Network Reliability and Interoperability Council (NRIC) at this time. NRIC, initially established by the Commission in 1992 as the Network Reliability Council, advises the Commission on recommendations to ensure optimal reliability and interoperability of the nation's

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crises and emergencies. National Communications System Mission Statement, available at http://www.ncs.gov/index.html (visited July 28, 2005).

[368] Secretary of Defense Comments at 2.

[369] A service provider may be a common carrier for some purposes and not for others. *NARUC II*, 533 F.2d at 608; *see* 47 U.S.C. 153(44) (specifying that a "telecommunications carrier shall be a common carrier under [the] Act only to the extent it is engaged in providing telecommunications services").

[370] We further note that the pending *IP-Enabled Services Proceeding* addresses issues relating to IP-enabled services (a category that may overlap with wireline broadband Internet access service) and critical infrastructure necessary to provide for homeland security and public safety. *See IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4897-501, paras. 51-57 (2004) (*IP-Enabled Services NPRM*).

[371] *VoIP E911 Order*, at paras. 36-51.

[372] We defined interconnected VoIP as a service bearing the following characteristics: (1) the service enables real-time, two-way voice communications; (2) the service requires a broadband connection from the user's location; (3) the service requires IP-compatible CPE; and (4) the service offering permits users generally to receive calls that originate on the public switched telephone network (PSTN) *and* to terminate calls to the PSTN. *Id.* at para. 24.

communications networks.[373] Section 256 of the Act codifies the Commission's ability and obligation to oversee network planning and set standards to enable the Commission to carry out the objectives of this section as well as the Commission's prior practices in the area of network reliability and interoperability through the NRIC.[374] NRIC VI, the latest chartered council, significantly expanded its membership to include the Internet service industry[375] and included among its scope of activities numerous issues relating to the Internet and broadband deployment.[376]

120. Contrary to what some commenters suggest, we do not agree that classifying wireline broadband Internet access service as an information service would deny us the ability to oversee broadband interconnectivity.[377] Rather, we agree with the view that our actions in this proceeding will not constrain our ability to address network reliability and interoperability issues.[378] A purpose of section 256 is "to ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks."[379] This provision affords the Commission adequate authority to continue overseeing broadband interconnectivity and reliability issues, regardless of the legal classification of wireline broadband Internet access service. Moreover, NRIC's current charter directs it to make recommendations to increase the deployment and improve the security, reliability, and interoperability of "high-speed residential Internet access service,"[380] and we find that its activities in this regard are consistent with section 256.

C. Access by Persons with Disabilities

121. Section 255(c) of the Act requires that "a provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable."[381] Like the other Title II obligations discussed above, section 255 expressly applies to telecommunications services, not information services. Although the requirements contained in section 255 do not apply to information services, in the past the Commission has exercised its ancillary jurisdiction under Title I to extend accessibility obligations that mirror those under section 255 to two critically important information services, voicemail and interactive menu service.[382] This Order does not affect voicemail or interactive

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[373] *See, e.g.*, Charter of the Network Reliability and Interoperability Council - VII, at § B, *available at* http://www.nric.org/charter_vii/NRICVII_Charter_FINAL_Amended_2004_3_12_04.pdf) (visited July 21, 2005) (*NRIC VII Charter*).

[374] 47 U.S.C. § 256(b)(2), (c); *see, e.g.*, Network Reliability Performance Committee, Compendium of Technical Papers, § 2, *available at* http://www.nric.org/pubs/nric2/fg1/execsumm.pdf (visited July 21, 2005).

[375] *See* 47 U.S.C. § 256; *see also* NRIC Mission Statement, available at http://www.nric.org/ (visited July 11, 2005).

[376] *See, e.g., NRIC VII Charter*, at § B.1.

[377] *See, e.g.*, Allegiance Comments at 53 (arguing that section 256(b) limits to telecommunications services the Commission's authority to oversee and coordinate network planning).

[378] SBC Comments at 41.

[379] 47 U.S.C. § 256(a)(2).

[380] *NRIC VII Charter*, at § B.4.

[381] 47 U.S.C. § 255(c).

[382] *See Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, 6455, para. 93 (1999) (*Section 255 Order*). The Commission declined at that (continued . . .)

menu service providers' obligations or other telecommunications service providers' obligations under section 255(c). We will continue to exercise our Title I authority, as necessary, to give full effect to the accessibility policy embodied in Section 255.

122. In addition, section 225(b) directs the Commission to ensure "telecommunications relay services" (TRS), a set of services that includes both video relay service (VRS) and IP relay, are available to individuals with hearing or speech impairments.[383] The Commission has previously determined that the statutory definition of TRS includes both information services and telecommunications services.[384] Nothing in this Order disturbs that earlier conclusion; consequently, this Order will not affect TRS requirements or the ability of TRS users to access VRS or IP relay.[385]

123. In addition, the Commission will remain vigilant in monitoring the development of wireline broadband Internet access service and its effects on the important policy goals of section 255.[386] As noted

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time, however, to extend accessibility obligations to other information services, such as e-mail, electronic information services, and web pages, that did not appear to have the potential to render telecommunications services inaccessible to persons with disabilities. *Id.* at 6461, para. 107. The Commission instituted a Further Notice of Inquiry at the same time to obtain additional information about Internet telephony and certain computer-based equipment that replicates current telecommunications functionality. The Commission stated that its goal was "to take full advantage of the promise of new technology, not only to ensure that advancements do not leave people with disabilities behind, but also to harness the power of innovation to break down the accessibility barriers we face today and prevent their emergence tomorrow." *See id.* at 6483, para. 175.

[383] 47 U.S.C. § 225(b); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67 & CG Docket No. 03-123, Order on Reconsideration, FCC 05-139, at paras. 6-7 (rel. July 19, 2005) (*IP Relay Reconsideration Order*). VRS is TRS that permits individuals with hearing or speech disabilities to communicate with voice telephone users through video equipment. *See* 47 C.F.R. § 64.601(17). IP Relay is TRS provided over the Internet. After a user establishes a local connection to an ISP and selects an Internet address of an IP Relay provider, the IP Relay provider will establish an Internet connection, via a toll-free number, to the relay center. This call is then routed to a communications assistant and the regular relay session is initiated. *IP Relay Reconsideration Order*, at n.6; *Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 7779 (2002) (*IP Relay Declaratory Ruling & FNPRM*).

[384] 47 U.S.C. § 225(a)(3); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, 5177-78, para. 88 (2000) (*Improved TRS Order & FNPRM)* (concluding that "section 225 does not limit relay services to telecommunications services, but . . . reaches enhanced or information services").

[385] We note that, as part of our efforts to help ensure that individuals with hearing or speech disabilities have access to communications technologies that is functionally equivalent to that available to people without these disabilities, we recently adopted new VRS rules that establish mandatory speed of answer requirements for VRS; require VRS to be offered 24 hours a day, seven days a week; and permit VRS providers to receive compensations from the interstate TRS fund for providing VRS mail and translation between American Sign Language and Spanish. *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67 & CG Docket No. 03-123, Order, FCC 05-140 (rel. July 19, 2005); *IP Relay Reconsideration Order, supra* n.383.

[386] The Commission is currently reviewing the issue of disability access with respect to IP-enabled services. *IP-Enabled Services NPRM*, 19 FCC Rcd at 4897-501, paras. 58-60. In addition, the Commission has before it a number of other pending proceedings related to disability issues. *See, e.g.*, California Coalition of Agencies Serving (continued . . .)

above, we will exercise our Title I ancillary jurisdiction to ensure achievement of important policy goals of section 255 and also section 225 of the Act.[387]

124. Consistent with our decision today to require facilities-based wireline broadband Internet access service providers to continue to contribute to universal service support mechanisms for an additional 270-day period,[388] as a matter of policy, we also require such providers to report the revenue on Form 499-A[389]

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the Deaf and Hard of Hearing, Petition for Declaratory Ruling on Interoperability, CC Docket No. 98-67 & CG Docket No. 03-123 (filed Feb. 15, 2005) (seeking ruling that VRS providers cannot limit access of their equipment to one provider); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket Nos. 90-571 & 98-67, CG Docket No. 03-123, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCC Rcd 12475 (June 30, 2004) (*2004 TRS Report & Order*) (issues raised in the FNPRM are pending); *Closed Captioning of Video Programming, Telecommunications for the Deaf, Inc. Petition for Rulemaking*, CG Docket No. 05-231, Notice of Proposed Rulemaking, FCC 05-142 (July 21, 2005); *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, Access to Telecommunications Service, Telecommunications Equipment and Consumer Premises Equipment by Persons with Disabilities*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417 (1999). Also pending are petitions for reconsideration of various aspects of the *2004 TRS Report & Order* filed by Communication Services for the Deaf, Inc. (CSD), the National Video Relay Service Coalition (NVRSC), Hands On Video Relay Services, Inc. (HOVRS), and Hamilton Relay, Inc. (Hamilton). Further, CSD, NVRSC, HOVRS, and Hamilton have filed applications for review of *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Order, 19 FCC Rcd 12224 (Con. & Gov. Aff. Bur. 2004) (*2004 Bureau TRS Order*), *modified Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Order, 19 FCC Rcd 24981 (Con. & Gov. Aff. Bur. 2004) (*Modified 2004 Bureau TRS Order*). Finally, on July 26, 2004, Telco Group, Inc., filed a Petition for Declaratory Ruling, or in the Alternative, Petition for Waiver seeking a ruling excluding international revenues from the revenue base used to calculate contributions to the Interstate TRS Fund.

[387] We will take this commitment into account in all ongoing proceedings that affect access to services by people with disabilities. *See Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Access to Telecommunications Service, Telecommunications Equipment and Consumer Premises Equipment by Persons with Disabilities*, Report and Order and Further Notice of Inquiry, WT Docket No. 96-198 (Sept. 29, 1999); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 90-571, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCC Rcd 12475 (2004) (petitions for reconsideration filed by CSD, NVRSC, HOVRS, and Hamilton; Telco Group, Inc., Petition for Declaratory Ruling, or in the Alternative, Petition for Waiver (filed July 26, 2004) (seeking ruling excluding international revenues from the revenue base used to calculate contributions to the Interstate TRS Fund); California Coalition of Agencies Serving the Deaf and Hard of Hearing, Petition for Declaratory Ruling on Interoperability, CC Docket No. 98-67, CG Docket No. 03-123 (filed Feb. 15, 2005); *Modified 2004 Bureau TRS Order*, *supra* (applications for review filed by CSD, NVRSC, HOVRS, and Hamilton.

[388] *See supra* para. 113. Section 225(b)(1) of the Communications Act, which codifies Title IV of the Americans with Disabilities Act of 1990, directs the Commission to "ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States." 47 U.S.C. § 225(b)(1). To that end, the Commission established the TRS Fund to reimburse TRS providers for the costs of providing interstate telecommunications relay services. *See Telecommunications Relay Services and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Third Report and Order, 8 FCC Rcd 5300, 5301, para. 7 (1993) ("*TRS III Order*"). NECA currently is responsible for administering the TRS Fund. Pursuant to section 64.604(c)(5)(iii)(A) of the Commission's rules, every carrier that provides interstate telecommunications services must contribute to the TRS Fund based upon its interstate end-user revenues. 47 C.F.R. § 64.604(c)(5)(iii)(A).

associated with the transmission component of their wireline broadband Internet access service as of the effective date of this Order for an additional 270-day period for purposes of contributing to the TRS fund for that same 270-day period.[390]

D. NANPA Funding

125. Pursuant to this same interim authority,[391] we require facilities-based wireline broadband Internet access service providers to continue to contribute to the cost of numbering administration through the NANPA funding mechanism established by the Commission pursuant to section 251(e) of the Act for the same 270-day period. We take this action to ensure that the funding for this critical function does not immediately decrease while the Commission examines what, if any funding related obligations should apply to facilities-based broadband Internet access service providers.[392] Section 251(e)(2) requires that "[t]he cost of establishing telecommunications numbering administration arrangements . . . be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."[393] In carrying out this statutory directive, the Commission adopted section 52.17 of its rules, which requires, among other things, that all telecommunications carriers contribute toward the costs of numbering administration on the basis of their end-user telecommunications revenues for the prior calendar year.[394]

E. Obligations of Incumbent LECs Under Section 251

126. As noted, the *Wireline Broadband NPRM* sought comment on the relationship between a competitive LEC's rights under section 251 and the Commission's tentative conclusion that wireline broadband Internet access service is an information service with a telecommunications input.[395] Several competitive LECs, and one BOC, argue that regardless of how the Commission classifies wireline

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[389] The Commission requires telecommunications providers to submit financial information on Telecommunications Reporting Worksheets (FCC Form 499-A) to enable the Commission to determine and collect certain statutorily mandated assessments. In 1999, to streamline the administration of multiple federal funding programs and to ease the burden on regulatees, the Commission consolidated the information filing requirements for multiple telecommunications regulatory programs into the annual Telecommunications Reporting Worksheet. *See 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Report and Order, 14 FCC Rcd 16602 (1999) (*Contributor Reporting Requirements Order*). The next year the Commission revised the Telecommunications Reporting Worksheet slightly to collect the additional information necessary to achieve its goal of establishing a central repository for interstate telecommunications providers by the least provider-burdensome method. *Implementation of the Subscriber Carrier Selection Provisions of the Telecommunications Act of 1996*, CC Docket No. 94-129, Third Report and Order and Second Order on Reconsideration, 15 FCC Rcd 15996, 16026, para. 63 (2000) (*Carrier Selection Order*). NECA, as the TRS Administrator, uses the prior year's revenue information provided on the Telecommunications Reporting Worksheet to determine amounts owed for the TRS. *See* 47 C.F.R. § 64.604(c).

[390] Our authority to take this interim action to preserve the *status quo* mirrors the authority upon which we require continued contribution for USF funding. *See supra* note 359.

[391] *See id.*

[392] 47 U.S.C. § 251(e).

[393] 47 U.S.C. § 251(e)(2).

[394] 47 C.F.R. § 52.17(a).

[395] *Wireline Broadband NPRM*, 17 FCC Rcd at 3047, para. 61.

broadband Internet access service, including its transmission component, competitive LECs should still be able to purchase UNEs, including UNE loops to provide stand-alone DSL telecommunications service, pursuant to section 251(c)(3) of the Act.[396] We agree.

127. Section 251(c)(3) and the Commission's rules look at what use a competitive LEC will make of a particular network element when obtaining that element pursuant to section 251(c)(3); the use to which the incumbent LEC puts the facility is not dispositive.[397] In this manner, even if an incumbent LEC is only providing an information service over a facility, we look to see whether the requesting carrier intends to provide a telecommunications service over that facility.[398] Thus, competitive LECs will continue to have the same access to UNEs, including DS0s and DS1s, to which they are otherwise entitled under our rules, regardless of the statutory classification of service the incumbent LECs provide over those facilities. So long as a competitive LEC is offering an "eligible" telecommunications service – *i.e.*, not exclusively long distance or mobile wireless services – it may obtain that element as a UNE.[399] Accordingly, nothing in this Order changes a requesting telecommunications carriers' UNE rights under section 251 and our implementing rules.[400]

[396] *See* Covad Comments at 84; MCI Comments at 73-76; Letter from Andrew D. Lipman, Richard M. Rindler, & Patrick J. Donovan, Counsel for McLeodUSA, to Chairman Kevin J. Martin, FCC, CC Docket No. 02-33, at 1-2 (filed Aug. 3, 2005) (McLeodUSA Aug. 3, 2005 *Ex Parte* Letter); Letter from Jason Oxman, Senior Vice President, Legal Affairs, CompTel/ALTS, to Marlene H. Dortch, Secretary, FCC, at 2 (filed July 12, 2005) (CompTel/ALTS July 12, 2005 *Ex Parte* Letter); *see also* Qwest Apr. 10, 2003 *Ex Parte* Letter, Attach. at 3 ("CLEC access to UNEs not at risk in this proceeding").

[397] A "network element" is an element that is "capable of being used by a requesting carrier in the provision of a telecommunications service," regardless of whether the element is "actually used by the incumbent LEC in the provision of a telecommunications service." *Triennial Review Order*, 18 FCC Rcd at 17020, para. 59 (emphasis omitted).

[398] In any event, section 251(h) of the Act defines incumbent LECs for purposes of section 251 of the Act, and nothing in this Order has any effect on such definition or the obligations associated therewith. 47 U.S.C. § 251(h); *cf. WorldCom v. FCC*, 246 F.3d. 690, 695 (D.C. Cir. 2001) ("[W]e find no error in the Commission's conclusion that it can apply the § 251(c) duties to a firm that met the § 251(h) criteria on February 8, 1996 and is still providing 'exchange access' or 'telephone exchange service.'") (emphasis omitted). An incumbent LEC's obligations under section 251(c) will remain until the incumbent LEC is either determined not to be an incumbent LEC under section 251(h), or the Commission forbears from section 251 obligations; we have not done either to date.

[399] *See, e.g.*, 47 C.F.R. § 51.309(b), (d) (allowing a requesting carrier to provide any telecommunications services over a UNE, provided that the UNE is not used exclusively for the provision of mobile wireless services or interexchange services); *USTA II*, 359 F.3d at 592 (affirming the need to analyze the services that a competing carrier seeks to provide using UNEs); *Triennial Review Remand Order*, 20 FCC Rcd at 2551-58, paras. 34-40 (evaluating the need for competitive LECs to obtain UNEs based on the services the competitive LECs seek to offer); *see also Triennial Review Order*, 18 FCC Rcd at 17350-66, paras. 590-619 (establishing criteria to limit access to enhanced extended links (EELs) to eligible services), *aff'd USTA II*, 359 F.3d at 592-93; McLeodUSA Aug. 3, 2005 *Ex Parte* Letter at 1 (stating that competitive LECs must continue to have access to UNEs regardless of the statutory classification of wireline broadband Internet access service).

[400] Similarly, our classification determinations in this Order have no effect whatsoever on the section 251 interconnection obligations of incumbent LECs or on competitive LECs' rights to obtain such interconnection. *See* 47 U.S.C. § 251(c)(2).

F. Cost Allocation

128. In this section, we address cost allocation issues raised by our decision to allow incumbent LECs to enter into non-common carriage arrangements with affiliated and unaffiliated ISPs for the provision of wireline broadband Internet access transmission using facilities that are also used for provision of regulated telecommunications services. Specifically, we address whether we should require incumbent LECs subject to our part 64 cost allocation rules to classify that activity as a regulated activity, as opposed to a nonregulated activity, under our part 64 cost allocation rules.[401] We conclude that incumbent LECs should classify this non-common carrier activity as a regulated activity under those rules and that this accounting treatment is consistent with section 254(k) of the Act.[402]

1. Relative Costs and Benefits

129. The part 64 cost allocation rules set forth a detailed methodology that incumbent LECs subject to those rules must follow in allocating the amounts recorded in their part 32 accounts between regulated and nonregulated activities.[403] Those rules also require some of these incumbent LECs to maintain cost allocation manuals setting forth how they will implement those principles.[404] The costs and revenues allocated to nonregulated activities are excluded from the jurisdictional separations process. In contrast, the costs and revenues allocated to regulated activities are apportioned between the state and interstate jurisdictions in accordance with the part 36 jurisdictional separations rules.[405] Each regulatory jurisdiction applies its own ratemaking processes to the amounts assigned to it by part 36. States, however, may add back costs that are identified as nonregulated under part 64, or remove additional costs that are identified as regulated under part 64.[406]

130. In this Order, we allow the non-common carrier provision of wireline broadband Internet access transmission that we previously have treated as regulated, interstate special access service,[407] but we do not preemptively deregulate any service currently regulated by any state.[408] Therefore, as specified in section 32.23 of our rules, the provision of this transmission is to be classified as a regulated activity under part 64 "until such time as the Commission decides otherwise."[409] We do not "decide otherwise" at this time because we find that the costs of changing the federal accounting classification of the costs

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[401] 47 C.F.R. § 64.901.

[402] 47 U.S.C. § 254(k).

[403] 47 C.F.R. § 64.901. Part 32 establishes a Uniform System of Accounts that certain incumbent LECs must use to record their historical costs and revenues. 47 C.F.R. Part 32.

[404] 47 C.F.R. § 64.903.

[405] 47 C.F.R. Part 36.

[406] *Joint Cost Order*, 2 FCC Rcd at 1310, paras. 88-90 (states not required to use joint cost rules for intrastate ratemaking); *see Detariffing the Installation and Maintenance of Inside Wiring*, Third Report and Order, CC Docket No. 79-105, 7 FCC Rcd 1334, 1339, paras. 41-42 (1992).

[407] *See GTE DSL Order*, 13 FCC Rcd at 22474-83, paras. 16-32 (finding that GTE's ADSL service is an interstate special access service that should be federally tariffed).

[408] *See GTE DSL Reconsideration Order*, 17 FCC Rcd at 27411-12, para. 9 (stating that, in some circumstances, ADSL services may be appropriately tariffed as interstate services).

[409] 47 C.F.R. § 32.23(a); *see Joint Cost Order*, 2 FCC Rcd at 1308-09, para. 79 (stating intent to address on a case-by-case basis the accounting treatment to be accorded activities deregulated only in the interstate jurisdiction).

underlying this transmission would outweigh any potential benefits and that section 254(k) of the Act does not mandate such a change.

131. Requiring that incumbent LECs classify the provision of broadband Internet access transmission provided on a non-common carrier basis as a nonregulated activity under part 64 would mean, among other matters, that incumbent LECs would have to develop, and we would have to review, methods for measuring the relative usage that this transmission and the incumbent LECs' traditional local services make of incumbent LECs' transmission facilities.[410] Incumbent LECs argue that they should not have to undertake this task because it would impose significant burdens on them with little discernible benefit.[411] We agree. The Commission adopted the part 64 cost allocation rules during the late 1980s as one element of the nonstructural safeguards that were to replace the *Computer II* regime.[412] The principal purpose of those rules was to ensure that telephone ratepayers would continue to receive reasonable protections against improper cross-subsidization in the event the BOCs provided enhanced services on an integrated basis, rather than through separate subsidiaries.[413] The Commission also sought to ensure that ratepayers would share in any savings achieved through the integrated provision of regulated and nonregulated activities and to improve the cost allocation procedures used by other LECs, which had been relieved of structural separation requirements in *Computer II*.[414]

132. When the Commission developed the part 64 cost allocation rules, the LECs' interstate rates and many of their intrastate rates were set under rate base, cost-of-service regulation. The Commission designed those rules "to make sure that all of the costs of nonregulated activities are removed from the rate base and allowable expenses for interstate regulated services."[415] The rules therefore are quite detailed: they require LECs to apportion, on an account-by-account basis, all of their costs between regulated and nonregulated activities using direct assignment wherever possible and a specific cost allocation hierarchy where direct assignment is not possible.[416] This level of detail paralleled the level of detail in the cost-of-service calculations that LECs performed to develop their rates for interstate access services. Although not required to do so, many state commissions followed these rules for intrastate ratemaking purposes.

133. During the period since the adoption of the part 64 cost allocation rules, our ratemaking methods and those of our state counterparts have evolved considerably.[417] This evolution has greatly reduced

[410] *See* 47 C.F.R. § 64.901(b)(4) (requiring that investment in central office equipment and outside plant be allocated between regulated and nonregulated activities based on peak relative regulated and nonregulated usage).

[411] *See, e.g.*, Letter from Stephen L. Ernest, Regulatory Counsel, BellSouth, to Marlene. H. Dortch, Secretary, FCC, at 8-9 (filed June 29, 2004) (BellSouth June 29, 2004 *Ex Parte* Letter); Verizon Jan. 6, 2004 *Ex Parte* Letter at 3; Letter from Stephen L. Ernest, Regulatory Counsel, BellSouth, to Marlene. H. Dortch, Secretary, FCC, at 3-6 (filed Aug. 26, 2003) (BellSouth Aug. 26, 2003 *Ex Parte* Letter).

[412] *Computer III Phase I Order*, 104 FCC Rcd at 1074-77, paras. 234-40.

[413] *See Joint Cost Order*, 2 FCC Rcd at 1303, para. 37; *see Joint Cost Reconsideration Order*, 2 FCC Rcd at 6283-84, paras. 1, 6.

[414] *See Joint Cost Order*, 2 FCC Rcd at 1304, para. 39; *Joint Cost Reconsideration Order*, 2 FCC Rcd at 6300, para. 156.

[415] *Joint Cost Order*, 2 FCC Rcd at 1304, para. 40.

[416] *See* 47 C.F.R. § 64.901.

[417] *See, e.g., MAG Order*, 19 FCC Rcd at 4153-55, paras. 70-72; Verizon Jan. 6, 2004 *Ex Parte* Letter at 3 (pointing out that, in most states, cost allocation results do not affect rates for local telephone services).

incumbent LECs' incentives to overstate the costs of their tariffed telecommunications services.[418] Based on the current record, we find that this reduction in incentives diminishes the need for incumbent LECs to apply detailed and burdensome procedures to exclude the costs of providing broadband Internet access transmission from their regulated costs.[419] A nonregulated classification therefore would generate at most marginal benefits.[420]

134. Requiring that incumbent LECs classify their non-common carrier, broadband Internet access transmission activities as nonregulated activities under part 64 would impose significant burdens that outweigh these potential benefits.[421] In particular, the cost allocation principles set forth in our part 64 rules assume that meaningful measures of cost causality and usage will be available to help allocate a carrier's investments and expenses between regulated and nonregulated activities.[422] If we were to require that incumbent LECs classify their non-common carrier, broadband Internet access transmission activities as nonregulated activities under part 64, the extent of nonregulated usage of incumbent LECs' networks could increase dramatically. New measures of cost causality and usage would have to be developed to reflect this increased nonregulated usage.[423] These measures, moreover, would have to reflect the evolution of the incumbent LECs' networks from traditional circuit-switched networks into IP-based networks.[424] The proceedings to set these measures would be both resource-intensive and, given the changes in network technology from the time when the part 64 cost allocation rules were developed, likely to lead to arbitrary cost allocation results.

135. Because the costs of requiring that incumbent LECs classify their non-common carrier, broadband Internet access transmission operations as nonregulated activities under part 64 exceed the potential benefits, we decline to require such a classification. Classifying those operations as regulated under part 32 means that any necessary ratemaking adjustments, including any reallocations of costs, will be addressed in the ratemaking process in the relevant regulatory jurisdiction. In our case, that is the interstate jurisdiction. Currently, some price cap carriers treat broadband special access services as price cap services, while others treat these broadband services as services excluded from price caps. Price cap carriers that have tariffed these services under price caps, and that choose to replace these tariffed services with non-common carriage arrangements, will make the appropriate adjustments to the actual price index (API) and price cap index (PCI) for the special access basket. The ordinary application of the price cap rate formulas will ensure that other special access rates remain consistent with the price cap rules after deregulation of broadband transmission services. Carriers that have excluded broadband transmission services from price caps will not need to make these adjustments.

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[418] *See, e.g.*, BellSouth Aug. 26, 2003 *Ex Parte* Letter at 3-6.

[419] *See, e.g.*, BellSouth June 29, 2004 *Ex Parte* Letter at 3-7; BellSouth Aug. 26, 2003 *Ex Parte* Letter at 3-6; Verizon Jan. 6, 2004 *Ex Parte* Letter at 3.

[420] *See, e.g.*, BellSouth June 29, 2004 *Ex Parte* Letter at 3-7; BellSouth Aug. 26, 2003 *Ex Parte* Letter at 3-6; Verizon Jan. 6, 2004 *Ex Parte* Letter at 3.

[421] *E.g.*, BellSouth June 29, 2004 *Ex Parte* Letter at 8.

[422] *See* 47 C.F.R. § 64.901(b)(3), (4).

[423] *See, e.g.*, BellSouth June 29, 2004 *Ex Parte* Letter at 8-9.

[424] *See* Verizon June 26, 2003, *Ex Parte* Letter at 4 (asserting that it likely is not even possible to apply the part 64 cost allocation rules to wireline broadband Internet access services in any reasonable fashion because those rules require allocations based on usage, a concept applicable to circuit-switched services but almost-meaningless in the packet-switched world).

136. Our ruling here with respect to the accounting treatment of broadband Internet access transmission provided on a non-common carrier basis does not change the accounting treatment that applies to broadband Internet access service provided to end users. That is, and always has been, an information service. An incumbent LEC that offers this service must continue to account for it as a nonregulated activity.

137. We note that our decision to treat the non-common carrier provision of broadband Internet access transmission as a regulated activity under part 64 will affect the results of computations of the rate of return earned on interstate Title II services. This is not a matter of practical concern with respect to most incumbent LECs regulated under the *CALLS* plan or price caps, because earnings determinations are not used in determining their price cap rates.[425] In the event that an earnings determination is needed for some ratemaking purpose, the affected carrier will have to propose a way of removing the costs of any non-Title II services from the computation. Price cap carriers that have not taken advantage of pricing flexibility, and therefore are still able to take advantage of low-end adjustments to their price cap rates, will have to address this cost allocation issue if and when they seek a low-end adjustment.

138. Finally, all rate-of-return carriers that have participated in this proceeding have stated that they wish to continue offering broadband transmission as a Title II common carrier service.[426] We have provided them with this option. As such, we do not, at this time, address the treatment of private carriage arrangements by rate-of-return carriers because the issue is entirely hypothetical.

2. Section 254(k)

139. Section 254(k) of the Act states that a telecommunications carrier "may not use services that are not competitive to subsidize services that are subject to competition."[427] That section also requires the Commission to establish, with respect to interstate services, accounting and cost allocation rules that ensure that "services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services."[428] By continuing to treat the provision of wireline broadband transmission as a regulated activity under part 64, we do not change the regulatory cost allocation treatment and thus do not change their status under section 254(k). Our actions in this Order therefore do not create a violation of section 254(k).

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[425] The price cap plan no longer contains a sharing requirement, and most price cap carriers have foregone the possibility of obtaining an earnings-based low-end adjustment in order to take advantage of pricing flexibility. *See generally MAG Order*, 19 FCC Rcd at 4154-55, paras. 71-72; *Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates*, WC Docket No. 03- 228, Report and Order, 19 FCC Rcd 5102, 5115 n.72 (2003) (*Operate Independently Order*) (pointing out that because the BOCs have taken advantage of pricing flexibility, they cannot resort to the low-end adjustment).

[426] Letter from Daniel Mitchell, Vice President, Legal and Industry, NTCA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, at 1 (filed Aug. 2, 2005) (NTCA Aug. 2, 2005 *Ex Parte* Letter); Letter from Stuart Polikoff, Director of Government Relations, OPASTCO, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, at 2 (filed July 12, 2005) (OPASTCO July 12, 2005 *Ex Parte* Letter) (stating that many rural incumbent LECs offer DSL transmission services under the NECA tariff and participate in associated revenue pools, and that the Commission must preserve this option for those carriers).

[427] 47 U.S.C. § 254(k).

[428] *Id.*

140. We reject NARUC's and the State Consumer Advocates' argument that we must, under section 254(k), require incumbent LECs to reallocate a portion of their joint and common loop costs from "universal services" as a group to wireline broadband Internet access transmission.[429] The State Consumer Advocates submit a cost allocation proposal (which it characterizes as "market-driven") that differs from the current part 64 rules.[430] BellSouth and SBC assert that cost allocations are not relevant under price cap regulation and that the Commission should reject the State Consumer Advocates' proposal.[431]

141. We find that section 254(k) of the Act does not mandate allocation of interstate loop costs to non-common carrier broadband Internet access transmission. Under the *CALLS* access charge plan, the interstate loop costs of price cap carriers are not assigned to the different services that subscribers may receive over the loop, but are recovered directly from end users through the subscriber line charge. The Commission explicitly found that section 254(k) did not prohibit this cost recovery mechanism,[432] and the Fifth Circuit upheld this finding.[433]

142. The subscriber line charge is not itself a "service included in the definition of universal service." The interstate loop costs recovered through the subscriber line charge represent the costs of all jurisdictionally interstate uses of the loop. Since 1998, those uses have included both services supported by universal service, such as access to interexchange service, and broadband special access services, which are not supported by universal service. Costs need not be reallocated at this time from the subscriber line charge to non-common carrier, broadband Internet access transmission in order to prevent imposition of an unreasonable level of joint and common costs on services included in the definition of universal services. This is not, as State Consumer Advocates claim, unreasonable. Rather, it is a reasonable and rational cost allocation approach.[434] We can take additional steps to address cost allocation issues in the future if the need arises.

143. We observe that NARUC and the State Consumer Advocates appear to assume that any reallocation of loop costs to broadband Internet access transmission would be given effect in the ratemaking process in such a way that consumers who do not receive wireline broadband Internet access service over their loops would have their tariffed rates reduced. This ratemaking approach would likely produce a relatively small per-line rate reduction for the large number of consumers who do not receive this broadband service, while leaving a larger per-line amount to be recovered from the smaller number of consumers who receive both narrowband and broadband services over their loops. This form of cost reallocation produces anomalous results, and we do not adopt it. It would cause a consumer who buys the

[429] NARUC Comments at 12-13; State Consumer Advocates Comments at 24-25.

[430] State Consumer Advocates Comments at 26. This proposal would require allocation to broadband Internet access of an amount of cost equal to the difference between the competitor's wholesale price and the incumbent LEC's incremental cost for broadband transmission service. *Id.* at 27.

[431] BellSouth Comments at 27-29; SBC Reply at 63-64.

[432] *See Access Charge Reform*, CC Docket Nos. 96-262 and 94-1, Sixth Report and Order, 15 FCC Rcd 12962, 12998-13001, paras. 91-97 (2000) (subsequent history omitted) (*CALLS Order*).

[433] *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313, 323-324 (5th Cir. 2001).

[434] State Consumer Advocates argue that the need to assign costs among all services using the loop will become even more important as incumbent LEC networks are engineered to deliver a variety of integrated services. State Consumer Advocates Comments at 33-34. We conclude instead that as more services are offered over a single loop, cost allocations are likely to become more arbitrary and thus less reasonable.

two services over the same loop to pay much more for that facility than a consumer who buys only narrowband service, even though the cost of that facility is fixed and does not vary in proportion to usage. It would be possible to devise a scheme in which costs were reallocated only with respect to those loops on which both services are being provided, but this would seem to produce only a shifting of charges from one part of the customer's bill to another.

144. We note that the question whether there should be any changes to the jurisdictional allocation of loop costs in light of use of the loop for broadband services was referred to the Federal-State Joint Board on Separations in 1999.[435] Specifically, in the wake of the Commission's determination in its 1999 tariff investigation that GTE's ADSL service was an interstate special access service subject to federal tariffing, NARUC filed a petition for clarification regarding the proper allocation under Part 36 of the Commission's rules of loop costs associated with DSL services.[436] Noting that issues associated with how to allocate local loop plant between voice and data services for purposes of jurisdictional separations were beyond the scope of the limited investigation in the tariff proceeding, the Commission stated that it would address these important issues in conjunction with the Joint Board.[437] This issue remains pending. In any event, separations is now subject to a five-year freeze, and the Joint Board is working on the approach that should follow this freeze; the issues we describe in this Order already fall within this context.[438] After the Joint Board makes its recommendation, we can reexamine the question of how any additional costs that might be assigned to the interstate jurisdiction may be recovered by local exchange carriers.

VII. ENFORCEMENT

145. We intend to swiftly and vigorously enforce the terms of this Order. Significantly, through review of consumer complaints and other relevant information, we will monitor all consumer-related problems arising in this market and take appropriate enforcement action where necessary. Similarly, we will continue to monitor the interconnection[439] and interoperability practices[440] of all industry participants, including facilities-based Internet access providers, and reserve the ability to act under our ancillary authority in the event of a pattern of anti-competitive conduct.[441]

VIII. NOTICE OF PROPOSED RULEMAKING

146. The broadband marketplace before us today is an emerging and rapidly changing one. Nevertheless, consumer protection remains a priority for the Commission. We have a duty to ensure that consumer protection objectives in the Act are met as the industry shifts from narrowband to broadband services. Through this *Notice*, we thus seek to develop a framework for consumer protection in the broadband age – a framework that ensures that consumer protection needs are met by *all* providers of

[435] *GTE DSL Reconsideration Order*, 17 FCC Rcd at 27412, para. 9; *see also Jurisdictional Separations and Referred to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 16 FCC Rcd 11382, 11397-98, para. 31 (2001).

[436] *GTE DSL Reconsideration Order*, 17 FCC Rcd at 27411, para. 7.

[437] *Id.* at 27412, para. 9.

[438] *See Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 16 FCC Rcd 11382 (2001).

[439] 47 U.S.C. § 251(a).

[440] 47 U.S.C. § 256.

[441] *See supra* n.339 (*citing NCTA v. Brand X*, slip op. at 25, regarding the Commission's Title I authority).